SEP 2 2 2003

No. 03-260

IN THE

Supreme Court of the United States

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Petitioner,

v.

MICHAEL H. HOLLAND, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1974 PENSION TRUST AND ITS TRUSTEES

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QUESTIONS PRESENTED

1. Whether the courts below properly required Abraham Fotta to demonstrate that the Trustees of the UMWA 1974 Pension Plan wrongfully delayed paying his disability pension benefits in violation of ERISA or the 1974 Pension Plan in order to obtain an award of interest on the lump sum portion of his disability pension award.

2. Whether the courts below properly denied class action certification based on the absence of a common issue of law or fact where the courts determined that a decision to award interest on wrongfully delayed disability pension benefits required an examination of the particular facts involved in each pension application.

LIST OF PARTIES

The correct Respondents are the United Mine Workers of America 1974 Pension Trust and its Trustees, Michael H. Holland, Marty D. Hudson, Joseph P. Brennan, and B.V. Hyler. The Trustees administer the UMWA 1974 Pension Trust and pay pension benefits from it in accordance with the terms of the UMWA 1974 Pension Plan. The Petitioner lists the UMWA Health and Retirement Fund of 1974 as a party but there is no such entity.

Petitioner is a beneficiary of the 1974 Pension Trust who receives a disability pension from the 1974 Pension Plan.

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BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1974 PENSION TRUST AND ITS TRUSTEES

STATEMENT OF THE CASE

Petitioner, Abraham Fotta ("Mr. Fotta"), seeks an award of interest on a lump sum pension payment, although his entitlement to the payment and the 1974 Pension Plan's obligation to pay him did not arise until he completed the application process, long after the period covered by the payment began. To obtain a disability pension under the 1974 Pension Plan, Mr. Fotta had to provide evidence to the Trustees that (1) he was in a mine accident; (2) he was granted a Social Security Disability Insurance ("SSDI") award; and (3) the mine

accident caused his disability. The lower courts properly found that the Trustees did not violate ERISA or the 1974 Pension Plan and, thus, did not owe Mr. Fotta interest when they promptly paid him disability pension benefits once he presented evidence from which they could conclude that a mine accident caused his disability.

As explained in more detail below, the Trustees initially denied Mr. Fotta's disability pension application in November 1987 because he did not provide evidence that the July 1984 mine accident in which he either sprained or fractured his ankle had substantially aggravated the preexisting recurrent ankle cysts that were the medical basis for his SSDI award. Mr. Fotta did not administratively appeal this decision, although he was advised that he could do so. Nearly six years later, Mr. Fotta provided the Trustees with a July 1, 1993 decision from the Pennsylvania Supreme Court that awarded Mr. Fotta workmens' compensation benefits and overturned the decisions of a Pennsylvania Workmen's Compensation Referee and the Pennsylvania Workmen's Compensation Board of Appeals that Mr. Fotta's ankle condition was not work related. Within the Pennsylvania Supreme Court's decision was a statement from Dr. Mitchell, an orthopedic surgeon, that "in my opinion the majority of [Mr. Fotta's] disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." Until receipt of the Pennsylvania Supreme Court decision, the Trustees did not have any evidence in the record before them to show that Mr. Fotta's ankle cysts were substantially aggravated by the 1984 trauma.[1] On the basis of Dr. Mitchell's statement, the Trustees determined that Mr. Fotta had demonstrated that his

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[1] The Trustees did have earlier statements from Dr. Mitchell that the ankle trauma *may* have aggravated the ankle cysts but these statements do not amount to evidence that the trauma *did* aggravate the ankle cysts much less evidence that it substantially aggravated the cysts.

ankle injury substantially aggravated the ankle cysts (*i.e.*, the villonodular synovitis) and, consequently, that he was eligible for a disability pension. After reaching this conclusion, the Trustees promptly paid Mr. Fotta the disability benefits to which he was entitled, including a lump sum for monthly payments back to the date of his mine accident.

A. Procedural History

In March 1997, Mr. Fotta filed a complaint against the Trustees. The complaint sought interest payments on a lump sum pension payment that Mr. Fotta had received from the UMWA 1974 Pension Trust as part of his disability pension award. Mr. Fotta attempted to bring the lawsuit as a class action on behalf of all similarly situated beneficiaries who had been denied interest. Mr. Fotta filed an amended complaint on July 28, 1997.

On August 15, 1997, the Trustees filed a motion to dismiss the amended complaint on the grounds that the 1974 Pension Plan does not provide for the payment of interest on back pension payments and ERISA does not provide a cause of action solely for prejudgment interest. On October 23, 1997, the district court granted the Trustees' motion to dismiss with prejudice the ERISA claim.

The United States Court of Appeals for the Third Circuit reversed the lower court's determination that Mr. Fotta failed to allege a cause of action under ERISA. *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 165 F.3d 209 (3rd Cir. 1998). The court held that a cause of action for interest on delayed pension benefits exists under Section 502(a)(3)(B) which empowers courts to award appropriate equitable relief to redress violations of ERISA or ERISA-regulated plans. *Id.* at 213. The court remanded the case for further proceedings consistent with its opinion.

On remand, the district court denied Mr. Fotta's class certification on October 27, 2000 on the grounds that the proposed class lacked a common issue of law or fact because the determination of whether each putative class member should receive interest would vary depending on the particular circumstances of each application. Following a non-jury trial in January 2001, the district court held that Mr. Fotta failed to prove his individual claim for interest. The court determined that Mr. Fotta was required to demonstrate that the Trustees "wrongfully withheld" or "wrongfully delayed" his pension benefits. (Pet. App. at 44A). After reviewing the facts, the district court determined that the Trustees had acted in accordance with the 1974 Pension Plan's eligibility requirements and declined to award Mr. Fotta any interest on his pension award. The lower court entered a final order on March 29, 2001.

On April 30, 2001, Mr. Fotta filed a notice of appeal and, on February 11, 2003, the United States Court of Appeals for the Third Circuit affirmed the district court's March 29, 2001 final order and October 27, 2000 denial of class certification.

B. The 1974 Pension Plan's Eligibility Requirements

The 1974 Pension Plan's disability pension eligibility requirements provide the critical framework for evaluating the Trustees' actions in this case. Article II.C of the 1974 Pension Plan requires that an applicant for a disability pension show that (1) he was involved in a mine accident; (2) he received a Social Security Disability Insurance ("SSDI") award; and (3) the mine accident caused his disability. (Pet. App. at 9A). Where causation is not obvious and direct, a mine accident that "substantially aggravates" a pre-existing condition is also deemed to have caused the disability. *Fotta*, 319 F.3d at 614. The 1974 Pension Plan grants the Trustees "full and final determination as to all issues concerning eligibility for benefits" which numerous courts have held grants the Trustees broad discretion to make

eligibility determinations. *See, e.g., Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997); *Moats v. UMWA Health & Retirement Funds*, 981 F.2d 685, 687 (3rd Cir. 1992). Pursuant to the 1974 Pension Plan and ERISA, the Trustees cannot make any pension payments until the Plan's eligibility criteria are satisfied.

In making these eligibility determinations, the Trustees apply written plan rules and regulations that are presented in question and answer format ("Q & A"). Q & A 252, promulgated in 1977, is relevant to this case. It defines the circumstances under which the Trustees shall determine that a miner has been "disabled as a result of a mine accident" as follows:

> (1) *Unexpectedness*: The disability must have been unlooked for and unforeseen; (2) *Definiteness*: The disability must be traceable to a definite time, place and occasion which occurred within the course of the mine worker's employment. A progressive disease does not meet this test and therefore cannot be a disability that resulted from a mine accident; (3) *Force or impact*: The disability must have been caused by the exertion or impact of some external physical force or object against the body or by the exertion *or* impact of the body against some external physical object; *i.e.*, not simply as a result of the mine worker's own physical condition.

(Pet. App. at 34A-35A). At issue in Mr. Fotta's application was whether there was a mine accident and, if so, did the mine accident substantially aggravate his disabling ankle cysts or were the ankle cysts primarily the result of his own physical condition.

C. Chronology of Events Related to Mr. Fotta's Pension Application

1. Summary of Events

Mr. Fotta suffered a mine accident in July 1984 in which he sprained or broke his ankle. Mr. Fotta's employer did not prepare an accident report for this incident. In 1986, after receiving an SSDI award for recurrent ankle cysts, Mr. Fotta applied for a disability pension from the 1974 Pension Plan, submitting information from his employer, Pennsylvania Workmen's Compensation, and medical providers. After reviewing the information in Mr. Fotta's application file, the Trustees denied Mr. Fotta's pension application in November 1987 because the record contained no evidence that his mine accident caused or substantially aggravated his ankle cysts. This determination was clearly correct based on the evidence in the record at the time. Mr. Fotta did not question or administratively appeal the Trustees' denial although he was informed of his right to do so. (Pet. App. at 9A).

Mr. Fotta had no further contact with the Funds for six years. In 1993, he submitted to the Trustees a decision of the Pennsylvania Supreme Court, *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144 (Pa. 1993), overturning decisions of a Pennsylvania Workmen's Compensation Referee and Board of Appeals. The Pennsylvania Supreme Court decision contains a statement from an orthopedic surgeon that Mr. Fotta's ankle injury contributed to his disability. Specifically, Dr. Mitchell stated that "in my opinion the majority of his disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d at 1146. Dr. Mitchell also noted that he did not think "that it was possible to separate the problems much more than that with any degree of reliability." *Id.* Based on this new information and despite his failure to appeal the prior determination, the

Trustees exercised their discretion and determined that Mr. Fotta had now demonstrated that a mine accident substantially aggravated his pre-existing ankle cysts. Mr. Fotta was promptly paid after this favorable determination. (Pet. App. at 10A). In accordance with the terms of the 1974 Pension Plan, Mr. Fotta's pension benefits included a lump sum representing monthly payments from the date of the mine accident until the date that he was found eligible for benefits.

2. Detailed Chronology of Events

Prior to July 23, 1984, Mr. Fotta worked as motorman at the United States Steel Mining coal mine. He had problems with his ankle prior to July 23, 1984 due to pigmented villonodular synovitis, a type of recurrent cyst. This evidence was contained in Mr. Fotta's pension file and was known to the Trustees when they initially denied Mr. Fotta's application in November 1987.

On July 23, 1984, Mr. Fotta sprained or fractured his ankle when falling or stepping off a motor. Mr. Fotta worked through his shift. Although no accident report was made, Mr. Fotta alleges that he told his foreman about the accident but declined to go to the employer's medical clinic immediately following the accident. Instead, Mr. Fotta went to see Dr. Eisley on July 24, 1984. Dr. Eisley noted swelling but found no fracture or dislocation. In addition, Dr. Eisley noted that Mr. Fotta had a synovial cyst in his ankle. When his ankle failed to improve, Mr. Fotta went to Dr. Mitchell on August 24, 1994. Dr. Mitchell reported a fracture just behind inner condyle of tibia and a bone cyst of the fibula. On December 3, 1984, Mr. Fotta had a malignant tumor removed from his right ankle. He was hospitalized for two weeks.

On May 10, 1985, relying on testimony from Dr. Mitchell that Mr. Fotta's ankle cyst was not caused by trauma but that it was *possible* that trauma aggravated the cyst, a Pennsylvania Workmen's Compensation Referee found that a

work related injury did not cause Mr. Fotta's ankle cyst and Mr. Fotta had failed to prove that his work related injury aggravated a pre-existing condition. This was the state of the record before the Trustees when they denied Mr. Fotta's application.[2] On July 15, 1985, Mr. Fotta received an SSDI award based on the malignant synovial tumor in his right ankle. On February 7, 1986, Mr. Fotta submitted his disability pension application to the UMWA Health and Retirement Funds' Morgantown Field Service Office.

On May 23, 1986, the Pennsylvania Workmen's Compensation Appeal Board affirmed the Workmen's Compensation Referee's Decision finding that Mr. Fotta's July 23, 1984 accident did not cause or aggravate his ankle cysts. The Appeal Board noted that Dr. Mitchell's testimony states only that it was possible that trauma aggravated Mr. Fotta's tumor and that Dr. Mitchell's testimony failed to establish that the trauma did, in fact, aggravate the tumor. The Appeal Board's decision was also before the Trustees when they initially denied Mr. Fotta's application.

On August 13, 1986, the Trustees received the first records from SSA. Around that same time, United States Steel Mining informed the Funds that: (1) Mr. Fotta worked his whole shift on July 23, 1984; (2) there is no accident report and no report made to mine officials on the date of the alleged injury; (3) no workmen's compensation was awarded. The company also forwarded workmen's compensation documents to the Funds. The workmen's compensation documents showed that the Pennsylvania Workmen's Compen-

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[2] Until 1993, the Trustees did not have Dr. Mitchell's later statements that, in his opinion, the trauma that Mr. Fotta suffered in July 1984 did, in fact, impair the healing of his ankle cysts. It was Dr. Mitchell's subsequent statements that provided the evidence necessary for the Trustees to conclude that Mr. Fotta's mine accident had substantially aggravated his pre-existing condition and, consequently, allowed the Trustees to award him a disability pension.

sation Referee denied Mr. Fotta's claim and that the Workmen's Compensation Appeal Board upheld the Referee's decision. The company reported that they had no medical information because Mr. Fotta had not submitted any to it. On November 4, 1986, Mr. Fotta's file was sent to Barbara McGeoch, Manager, Field Operations, for a disability narrative. On December 30, 1986, handwritten notes of the Trustees' pension processor about Mr. Fotta's application stated that the processor "accept[ed] that there was an ankle injury and that it aggravated a pre-existing tumor." There was actually no evidence in the pension file at that time to support the conclusion that an ankle injury aggravated Mr. Fotta's ankle cysts.[3] The processor also noted the need for more evidence to establish that a mine accident occurred. Logically, of course, the Trustees must resolve whether a mine accident occurred before they can make a determination whether the mine accident caused the disabling condition.

In January 1987, the Funds received some medical records from Mr. Fotta that showed a visit to Dr. Mitchell. Mr. Fotta sent additional records to the Funds in July 1987 that document a July 24, 1984 visit to Dr. Eisley. In September 17, 1987, Richard Robinson, Assistant Director, Morgantown FSO, reviewed Mr. Fotta's file. He concluded, after a review of workmen's compensation records, that Workmen's compensation was denied because "medicals did not confirm disability a result of accident" and the evidence failed to prove that a mine accident occurred. Thus, the evidence at the time failed to show that a mine accident caused or substantially aggravated Mr. Fotta's disabling condition.

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[3] Obviously, the processor's December 30, 1986 notes could not have referred to the March 13, 1987 letter from Dr. Mitchell that the Pennsylvania Supreme Court later found probative of Mr. Fotta's workmen's compensation claim.

On November 18, 1987, Betty Veach, Director, Morgantown Field Service Office, sent Mr. Fotta a denial letter because he had not established that his disability was caused by a mine accident. The reason for the denial is plainly stated in the letter: "You have not established that your disability was caused by a mine accident." The letter informed Mr. Fotta that he could contact her office if he disagreed with the determination and that he could request a hearing within 90 days.

Mr. Fotta did not contact her office or request a hearing. In fact, after the denial of his application, the Trustees had no contact with Mr. Fotta for six years. On June 15, 1993, Mr. Fotta sent the Funds a June 1, 1993 decision from the Pennsylvania Supreme Court that reversed the earlier workmen's compensation referee and board of appeal determinations. The last two pages are from a different case and the final few pages of Mr. Fotta's case are missing from the Funds' copies of this document. Thus, any evidence from those pages was *never* presented to the Trustees and *never* considered by them when acting on Mr. Fotta's application.

Instead of taking the position that Mr. Fotta's belated efforts were precluded because of his failure to appeal the prior determination, the Trustees accepted Mr. Fotta's new information and reconsidered their earlier denial. Based on new information set forth in the Pennsylvania Supreme Court's recitation of the medical evidence concerning Mr. Fotta's injury, the Trustees reversed their earlier denial. Specifically, the Pennsylvania Supreme Court quoted a March 13, 1987 letter from Dr. Mitchell in which he stated that "in my opinion the majority of his disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1146 (Pa. 1993). Dr. Mitchell also noted that he did not think "that it was possible to separate the problems much

more than that with any degree of reliability." Based on this new information, the Trustees exercised their discretion and determined that Mr. Fotta had now demonstrated that a mine accident substantially aggravated his pre-existing ankle cysts. The Trustees did not possess this information when they denied Mr. Fotta's application in 1987. The letter from Dr. Mitchell was never provided to the Trustees. Nevertheless, the Trustees accepted the information in the Pennsylvania Supreme Court's decision as evidence that Mr. Fotta's accident substantially aggravated his ankle cysts and in lieu of an accident report.

By August 12, 1993, M.R. Galusky, a member of the 1974 Pension Trust's staff, completed an initial review form summarizing this new information. On August 13, 1993, M.R. Galusky sent Mr. Fotta a federal income tax withholding form and asked him to confirm certain dates that he was off work in 1950. On August 25, 1993, M.R. Galusky sent a letter to United States Steel Mining inquiring about Mr. Fotta's work history, including Sickness & Accident ("S&A") leave and whether Mr. Fotta worked in non-classified positions. United States Steel Mining reported Mr. Fotta's S & A work history to the 1974 Pension Trust and to Mr. Fotta.

On September 29, 1993, Linda DeFuria, a Disability Pension Analyst and Registered Nurse, recommended that the Trustees award Mr. Fotta a disability pension. On September 30, 1993, Linda Fritz, Senior Manager Eligibility Processing, reviewed Mr. Fotta's file and Ms. DeFuria's recommendation, and she concurred with that recommendation. On November 1, 1993, Kyu Lee, Assistant Director, Eligibility Services, sent Mr. Fotta a letter informing him that he was entitled to a disability pension.

The effective date of Mr. Fotta's pension was initially determined to be September 1, 1985 which was Mr. Fotta's last day of S&A leave, as reported by United States Steel

Mining, and, consequently, the date through which he received pension credit towards a service pension. The lump sum awarded was $18,835 for retroactive payments to the September 1, 1985 pension effective date. Significantly, Mr. Fotta was not entitled to any payment on September 1, 1985 because he did not establish his eligibility until 1993.

On November 9, 1993, Mr. Fotta requested a hearing on the effective date of his pension and requested interest on the lump sum payment. On January 7, 1994, the Trustees sent a notice to Mr. Fotta telling him that prior to the hearing there is a pre-hearing conference where he can explain his dispute and present evidence. A pre-hearing conference was held on January 26, 1994. M.R. Galusky prepared summary of pre-hearing conference that reports that she informed Mr. Fotta that the 1974 Pension Trust would not pay interest on his pension award.

On March 21, 1994, Mr. Fotta submitted a copy of a January 28, 1994 interlocutory order entered on remand from the Pennsylvania Supreme Court that ordered United States Steel Mining to pay workmen's compensation beginning July 24, 1984 and crediting United States Steel Mining for S&A paid. In effect, the workmen's compensation decision on remand converted the period August 1, 1984 to August 1, 1985 from S&A leave to workmen's compensation covered time. M.R. Galusky concluded that Mr. Fotta was entitled to an earlier effective date of August 1, 1984, the first of the month following the month in which Mr. Fotta's disabling mine accident occurred, because the 1974 Pension Plan pays disability benefits for periods covered by workmen's compensation but not covered by S&A. On July 29, 1994, the 1974 Pension Trust sent Mr. Fotta an additional $1,965.00 for the period August 1, 1984 through August 1, 1985.

In March 1997, Mr. Fotta filed a complaint seeking interest on his lump sum payment and the legal proceedings described above began.

ARGUMENT

I. IN AGREEMENT WITH EVERY OTHER CIRCUIT TO HAVE CONSIDERED THE ISSUE, THE COURT OF APPEALS CORRECTLY REQUIRED MR. FOTTA TO DEMONSTRATE A VIOLATION OF THE 1974 PENSION PLAN OR ERISA IN ORDER TO ESTABLISH A CLAIM FOR INTEREST ON DELAYED BENEFITS

The court of appeals properly held that "an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself." *Fotta v. Trustees of the UMWA Health and Retirement Fund of 1974*, 319 F.3d 612, 616 (3d Cir. 2003). If the payment of benefits is delayed in violation of the benefit plan or ERISA, the delay is "wrongful" and the beneficiary may assert a claim for interest under Section 502(a)(3)(B) of ERISA as appropriate equitable relief to redress the violation. *Id.* Indeed, the plain language of Section 502(a)(3)(B) limits equitable relief to that which redresses a violation of the Plan or ERISA. *See Mertens v. Hewitt*, 508 U.S. 248, 253 (1993)(Section 502(a)(3)(B) "does not . . . authorize 'appropriate equitable relief' at large but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions of ERISA or an ERISA plan"). Absent a violation of the plan or ERISA, there is simply no statutory basis for an interest claim.

Contrary to Mr. Fotta's assertion, the circuit courts of appeal are not split on this issue. Every appellate court to consider the issue has required a claimant to demonstrate a violation of the plan or ERISA in order to make a claim for interest on delayed benefits under Section 502(a)(3)(B). *Flint v. ABB, Inc.*, 337 F.3d 1326, 1330 (11th Cir. 2003) (beneficiary must demonstrate that fiduciary violated terms of

benefit plan in order to state a claim for interest); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 750 (8th Cir. 2001)("district court correctly applied the rule adopted by this and other circuits, which requires a showing that plan was breached before interest on back benefits may be awarded under ERISA"); *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229 (2nd Cir. 2002)(award of interest permitted as equitable relief to remedy unjust enrichment when benefits delayed in violation of plan); *Clair v. Harris Trust and Savings Bank*, 190 F.3d 495, 498 (7th Cir. 1999) (interest available on delayed benefits to redress unjust enrichment that occurs when benefits are not paid when due under plan).

Moreover, the unanimous view of the lower courts that Section 502(a)(3)(B) authorizes a claim for interest as equitable relief when benefits are wrongfully delayed does not conflict with this Court's decisions. This Court has drawn a careful distinction between legal and equitable relief and limited the relief available under Section 502(a)(3)(B) to categories of relief that, prior to the merger of law and equity, were typically available in suits in equity. For example, *Great West Life & Annuity Ins. Co.*, 534 U.S. 204, 210 (2002), makes it clear that money damages based on breach of contract are quintessentially legal even if the relief sought is characterized as restitutionary. In contrast, *Great West* clearly provides that an ERISA beneficiary may make a claim for an accounting of profits on money held in constructive trust on behalf of the beneficiary. *Id.* at 213-14 n.2. A claim for interest on money that should have been paid to a beneficiary under the terms of an ERISA plan but was wrongfully withheld gives rise to an equitable right to the profits that the plan earned on the money while it was withheld. *Fotta v. Trustees of the UMWA Health and Retirement Fund of 1974*, 165 F.3d 209, 214 (3rd Cir. 1998)("any unjust enrichment of plans at the beneficiaries' expense should be avoided"). An interpretation of Section 502(a)(3)(B) that emphasizes disgorgement of wrongful gains

is fully consistent with the decision below, the decisions of the other courts of appeal that have addressed the issue, and this Court's previous rulings.

In this case, the district and appellate courts found that the Trustees acted within the terms of the plan and did not delay making payment to Mr. Fotta once he demonstrated his eligibility for benefits. Throughout this case, Mr. Fotta has ignored the fact that the Trustees could not pay him benefits until he established his eligibility for those benefits and, therefore, he had no right to payment prior to establishing his eligibility. Consequently, the Trustees were not wrongfully withholding benefits to which Mr. Fotta was entitled. Once Mr. Fotta provided the Trustees with evidence that a mine accident caused his disability, they promptly paid him. The measure of what Mr. Fotta was due included a lump sum for monthly payments back to the date of his 1984 mine accident but the benefits were not due until the 1974 Pension Plan's eligibility criteria were fulfilled. As the district and appellate court recognized, the Trustees did not act arbitrarily or capriciously when they initially denied Mr. Fotta's application based on a lack of evidence that a mine accident caused his disability and they dutifully paid Mr. Fotta once he provided the requisite proof. Under these circumstances, Mr. Fotta cannot possibly prove that the Trustees benefited from wrongfully retaining money that they should have paid to him.

II. THE COURT OF APPEALS PROPERLY DENIED CLASS CERTIFICATION WHERE THE RESOLUTION OF EVERY APPLICANT'S CLAIM FOR INTEREST DEPENDS ON THE UNIQUE FACTS AND CIRCUMSTANCES SURROUNDING HIS OR HER PENSION APPLICATION

A district court can only certify a proposed class if the class meets all four requirements of Rule 23(a) of the Federal

Rules of Civil Procedure: numerosity; commonality; typicality; and adequacy of representation. Fed. R. Civ. P. 23(a). Mr. Fotta proposes a class of approximately 107,000 pensioners who received their pensions after some administrative delay between their application and the payment of benefits. (Pet. App. at 51A.) He also proposes a smaller class of approximately 450 persons who successfully appealed an initial denial of benefits. (Pet. App. at 51A.) The court of appeals held that because the "putative members of the class are not entitled to interest if their benefits were not wrongfully delayed, they do not share common issues of law or fact and thus do not meet the Requirements of Rule 23." *Fotta*, 319 F.3d at 618. The court further noted that "[b]ecause both liability and the appropriate remedy must be determined for each plaintiff, no common issues of law or fact exist." *Id.* at 619.

Needless to say, the courts are in complete agreement that Rule 23(a) requires commonality. Mr. Fotta has identified no disagreement among the lower courts on this issue and the Trustees are aware of no interpretation of Rule 23(a) in any court that would call into question the lower courts' denial of class certification in this case. Based on the foregoing, there is no issue with respect to class certification that merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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